No. 92-1223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,
Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a federal agency, which is required by the Federal Service Labor-Management Relations Statute (5 U.S.C. 7114(b)(4)) to furnish the names and home addresses of bargaining unit employees to the union that is their exclusive representative, may nonetheless refuse to disclose that information on the basis of the Privacy Act (5 U.S.C. 552a).

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BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS

Amicus, the National Treasury Employees Union (NTEU), is a federal sector labor organization that is the exclusive collective bargaining representative of approximately 150,000 employees of the federal government nationwide. NTEU has a vital interest in the resolution of the issue presented in this case—whether federal agency employers are relieved of their statutory obligation to provide unions with the names and home addresses of bargaining unit employees by the Privacy Act.

The issue presented has great practical significance for unions and the employees they represent because direct home mailings are an essential tool of communication.

Often, such mailings are the only effective means of ensuring the timely exchange of important information between the union and bargaining unit employees. Ensuring effective communication beween the union and its constituents is vital to the union's discharge of its statutory responsibilities and to meaningful collective bargaining.

Because union security agreements are prohibited in the federal workplace (5 U.S.C. 7102), federal sector unions face an additional obstacle in their efforts to represent the interests of the unit as a whole. Approximately 40% of NTEU's bargaining units consist of non-members. These individuals are often less likely to take the initiative to contact the union with their concerns or to have received the union's direct invitation to do so. As a result, the union receives most of its input from active members and is often unable to accurately assess whether their concerns are shared by the non-member, whose interests it is also required to fairly represent. 5 U.S.C. 7114(a)(1).

For these reasons, before 1989, NTEU had routinely sought and obtained the agreement of federal agencies, in collective bargaining, to provide the union with periodically updated listings of the names and home addresses of all employees in the bargaining unit. NTEU used the addresses to communicate directly with employees about their rights, to solicit their support for the union's efforts, and to conduct surveys in connection with collective bargaining.

After the D.C. Circuit's 1989 decision in *FLRA v. Department of Treasury*,[1] however, in accordance with a new government-wide policy, the agencies with whom NTEU had agreements repudiated these contract provisions. Since that time, agencies have refused to pro-

[1] 884 F.2d 1446 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1055 (1990).

vide NTEU with the home address of any of the employees it represents—member and non-member alike.

The policy of refusing to provide home addresses seriously interferes with the union's ability to serve its constituents. The bargaining units served by NTEU, like those served by other major federal sector labor organizations, are large and geographically dispersed. For that reason, among others, home mailings are the only dependable way to reach unit employees on a comprehensive basis or to furnish time sensitive information.

Equally important, if the government's position is approved, Congress' intent to give the collective bargaining process and labor organizations a meaningful role in the federal civil service will be seriously undermined. For under the government's interpretation of the law, whenever *any* privacy interest—even the most insignificant one—is implicated, the union cannot obtain access to relevant data, no matter how compelling its need. That result both dramatically shifts the balance of power at the bargaining table in favor of the employer and disables the union from providing effective representation to the unit as a whole. NTEU is therefore submtting this brief, to assist the Court in resolving the important questions presented.

SUMMARY OF ARGUMENT

This Court should reject the government's argument that disclosure of employee names and home addresses to the union pursuant to the Federal Service Labor-Management Relations Statute[2] (the "labor statute") would result in a "clearly unwarranted invasion of employee privacy" within the meaning of 5 U.S.C. 552(b)(6). The indispensable premise of that argument is that in striking a balance between employee privacy interests and the public interests served by disclosure, the Court is forbidden to consider 1) Congress' express finding that

[2] 5 U.S.C. 7101 *et seq.*

unions and collective bargaining in the federal sector promote the public interest (5 U.S.C. 7101(a)) and 2) the unchallenged conclusion of the Federal Labor Relations Authority ("FLRA") that the disclosure at issue is "necessary" to enable unions to discharge their responsibilities under the statutory labor-management relations scheme. That premise finds no support in the statutory provisions at issue, or in this Court's decisions.

A. The FLRA's decision that disclosure of home addresses pursuant to the labor statute does not violate the Privacy Act[3] comports with the plain language of both that Act and the Freedom of Information Act ("FOIA").[4] Those statutes prohibit the disclosure of information in personnel files only when a "clearly unwarranted invasion of personal privacy" would result. 5 U.S.C. 552(b)(6). The disclosure of home addresses to the union does not result in an "unwarranted" privacy invasion because it directly serves the statutorily recognized public interest in collective bargaining in the civil service. That important public interest outweighs whatever minor interference with their "privacy" some employees may perceive when they receive correspondence from their bargaining representative at home.

B. There is no merit to the government's contention that the terms of the Privacy Act and the Freedom of Information Act, read in light of this Court's decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), prohibit the Court from weighing the public interest in collective bargaining as part of the balancing process. Neither the Privacy Act nor FOIA specifies the factors that a court must consider in applying the FOIA exemption 6 standard. Further, *Reporters Committee* applied the "clearly unwarranted invasion of personal privacy" standard in

[3] Privacy Act of 1974, 5 U.S.C. 552a.

[4] 5 U.S.C. 552.

the entirely different context of a request for information predicated exclusively upon the Freedom of Information Act, where no other Congressionally mandated disclosure interest existed.

Despite the fact that *Reporters Committee* did not address the issue, some of the lower courts have felt constrained to employ its definition of the public interest side of the balance, even in cases arising originally under the labor statute.[5] The result of this mechanical application of *Reporters Committee* is the frustration of Congressional intent under the labor statute to arm federal sector unions with the information they need to effectively represent employees both at the bargaining table and in the administration of the contract.

The Court, accordingly, should now clarify that when provision of information to the union is otherwise required by the labor statute, determining whether a privacy invasion is "warranted" under 5 U.S.C. 552(b)(6) requires the consideration of the public interests that statute serves.

[5] *FLRA v. United States Department of Defense, Army & Air Force Exch. Serv.*, 984 F.2d 370 (10th Cir. 1993); *FLRA v. United States Department of Defense*, 977 F.2d 545 (11th Cir. 1992); *Department of Navy, Navy Exchange v. FLRA*, 975 F.2d 348 (7th Cir. 1992); *FLRA v. Department of Navy, Navy Resale Activity*, 963 F.2d 124 (6th Cir. 1992); *FLRA v. Department of Veterans Affairs*, 958 F.2d 503 (2d Cir. 1992); *FLRA v. United States Department of the Navy, Naval Communications Unit*, 941 F.2d 49 (1st Cir. 1991); *FLRA v. Department of Treasury, supra.*

ARGUMENT

DISCLOSURE OF FEDERAL EMPLOYEES' NAMES AND HOME ADDRESSES TO THEIR ELECTED BARGAINING REPRESENTATIVE IS NOT PROHIBITED BY THE PRIVACY ACT

Section 7114(b)(4) of the labor statute establishes the duty of an agency "to furnish to the exclusive representative . . . . upon request and to the extent not prohibited by law, data . . . (B) which is reasonably available and necessary for full discussion, understanding, and negotiation of subjects within the scope of collective bargaining." In *Farmers Home Administration, Finance Office, St. Louis, Missouri*, 23 F.L.R.A. 788 (1986)[6] the FLRA held that the obligation to furnish "necessary" data required employer agencies to provide unions with employees' names and home addresses to enable them to effectively communicate with their constituents and discharge their representational responsibilities.

The FLRA's conclusion regarding the employer's obligation under the labor statute to provide home addresses is consistent with private sector precedent,[7] has been uniformly affirmed by the courts of appeals,[8] and is not

[6] *Aff'd in substantial part and remanded sub nom. Department of Agriculture v. FLRA*, 836 F.2d 1139 (8th Cir. 1988), *vacated and remanded*, 488 U.S. 1025 (1989).

[7] Private sector case law "generally provides strong guidance in parallel public sector matters." *Department of the Treasury*, 884 F.2d at 1458 (R. Ginsburg, J., concurring). It has been used specifically to guide the interpretation of section 7114(b)(4). *See North Germany Area Council v. FLRA*, 805 F.2d 1044, 1048 (D.C. Cir. 1986); *American Federation of Government Employees v. FLRA*, 793 F.2d 1360, 1363-64 (D.C. Cir. 1986).

[8] *Department of the Navy v. FLRA*, 840 F.2d 1131, 1137-39 (3d Cir. 1988), *cert. dismissed*, 488 U.S. 881 (1988); *Federal Labor Relations Authority v. Department of the Treasury*, 884 F.2d at 1449-50; *Department of the Air Force v. FLRA*, 838 F.2d 229, 231-32 (7th Cir. 1988); *Department of Agriculture v. FLRA*, 836 F.2d 1139, 1142 (8th Cir. 1988), *vacated and remanded*, 488 U.S. 1025 (1989); *Department of Health and Human Services v. FLRA*, 833 F.2d 1129, 1131-34 (4th Cir. 1987); *AFGE, Local 1760 v. FLRA*, 786 F.2d 554, 557 (2d Cir. 1986).

challenged here. Instead, the government argues that the Privacy Act (5 U.S.C. 552a), forbids agencies from disclosing home addresses to a union under the labor statute, because—in accordance with *Reporters Committee*—a member of the public could not have secured that information by making a request directly under the Freedom of Information Act. That contention is meritless.

A. The Privacy Act and the Freedom of Information Act Prohibit the Disclosure of Personal Information Only Where a Clearly Unwarranted Invasion of Personal Privacy Would Result

The Privacy Act of 1974 establishes a general prohibition against an agency's disclosure of information about an individual without the subject's written consent. 5 U.S.C. 552a(b). The Act was "passed largely out of concern over 'the impact of computer data banks on individual privacy'." *Reporters Committee*, 489 U.S. at 766, quoting H.R. Rep. No. 93-1417, p. 7 (1974). Among the thirteen exceptions to the Act's general prohibition, is an exception for disclosures "required under [5 U.S.C. 552]" (FOIA). 5 U.S.C. 552a(b)(2).

While the Privacy Act establishes a general prohibition against the release of records, FOIA "implements 'a general philosophy of full agency disclosure'." *Department of Air Force v. Rose*, 425 U.S. 352, 360 (1976), quoting S. Rep. 813, 89th Cong. 1st Sess. 3 (1065). As this Court has observed, "unless the requested material falls within one of [the] nine statutory exemptions, FOIA requires that records and materials in the possession of federal agencies be made available. . . ." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221 (1978); *see* 5 U.S.C. 552(a)(3). FOIA "places the burden on

the agency to justify the withholding of any requested documents." *Department of State v. Ray*, 112 S.Ct. 541, 547 (1991).

FOIA creates only a limited exception from its disclosure requirements pertaining to records that contain personal information. Material in "personnel and medical and similar files" are exempt from disclosure *only* when their release "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). This exemption—which is to be "narrowly construed" (*Rose*, 425 U.S. at 366)—was designed "to protect individuals from the injury and embarrassment that can result from the *unnecessary* disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982) (emphasis added).

B. Disclosure of Names and Home Addresses to the Union Does Not Result in an Unwarranted Invasion of Personal Privacy Because the Public Interests Served by the Disclosure Outweigh the Minor Privacy Interests At Stake

FOIA exemption 6 thus prohibits only "unnecessary" or "unwarranted" personal disclosures. All parties agree that to determine whether a privacy invasion is "warranted" a balance must be struck between the weight of the privacy interests at stake and the public interest in the disclosure. As the courts of appeals that have considered the question have overwhelmingly found, if the public interest in collective bargaining is considered, the balance of interests clearly favors the disclosure of names and addresses to the union.[9]

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[9] *FLRA v. U.S. Department of Defense*, 975 F.2d 1105, 1110-1111 (5th Cir. 1992); *FLRA v. Department of the Navy, Navy Resale and Services Support Office*, 958 F.2d 1490, 1496-97 (9th Cir. 1992); *Department of the Navy v. FLRA*, 840 F.2d at 1137; *Department of the Air Force v. FLRA*, 838 F.2d at 233; *Department of Health and Human Services v. FLRA*, 833 F.2d at 1135-1136; *AFGE, Local 1760 v. FLRA*, 786 F.2d at 556-557; *see also FLRA v. Department of Treasury*, 884 F.2d at 1459 (R. Ginsburg, J., concurring).

1. On the one hand, there is a strong statutorily based public interest in providing unions with information that is "relevant and necessary" to the collective bargaining process. Congress has determined that collective bargaining in the federal sector "safeguards the public interest" and "contributes to the effective conduct of public business." 5 U.S.C. 7101(a)(1). Therefore, it has found, "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. 7101(2).

The employer's statutory obligation to provide necessary information to the union serves this public interest directly. As this Court has observed in the analogous context in the private sector, good faith bargaining cannot take place when the employer withholds relevant information from the union. *See NLRB v. Acme Industrial Company*, 385 U.S. 432, 439 & n.6 (1967); *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 153 (1956). The concerns that led the Court to acknowledge this principle are no different in the federal sector.[10] Indeed, in section 7114(b)(4) Congress explicitly enacted into law the obligation to provide relevant information that in the private sector had been implied from the duty to bargain in good faith. Provision of names and addresses to the union, moreover, facilitates effective communication, which, in turn, assists the union in discharging its duties, and promotes the fullest possible exercise of employees' rights under the labor statute.

In that regard, there is no basis for the government's self-serving assertions that the union has ample opportunity to contact employees at work and that it can readily gather employees' addresses itself. (Pet. Br. at 28-29). These assertions are directly inconsistent with

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[10] *See FLRA v. Department of the Treasury*, 884 F.2d at 1458 (R. Ginsburg, J., concurring).

the FLRA's opinion, based upon its expertise in the field of federal sector labor relations, that alternative means of communicating at the worksite are ineffective and impractical. Thus, the FLRA has recognized, as the National Labor Relations Board did before it,[11] that alternative means of communicating are unreliable and that home mailings are qualitatively superior to other forms of communication.[12]

Indeed, access to employees' home addresses is even more important in the federal sector because bargaining units are generally quite large, and often dispersed over a large geographic area, sometimes nationwide. There is no other effective method of communicating with this large, dispersed group of individuals—particularly when the union needs to impart time-sensitive information or reach the unit as a whole.[13]

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[11] *E.g. Magma Copper Co.*, 208 N.L.R.B. No. 53 (1974).

[12] The FLRA has noted that home mailings are "fundamentally different from other communication through alternative means which are controlled in whole or in part by the agency." They place "the content, timing and frequency of the communication . . . completely within the discretion of the union and there is no possibility of agency interference in the distribution of the message. Further, direct mailings reach unit employees in circumstances where those employees may consider the union's communication without regard to the time constraints inherent in their work environments and in which any restraint the employee may feel as a result of the presence of agency management in the workplace is not present." *Farmers Home Administration*, 23 F.L.R.A. at 796-797.

[13] In our experience, bulletin boards, distribution racks and handbilling do not provide a comprehensive means of communicating with employees and are wholly unsatisfactory to communicate lengthy messages or solicit employee opinion. Desk drops are difficult to use because union officers are forbidden to enter other work areas while work is being performed and, in any event, cannot themselves engage in distributions except during their off duty time. Desk drops are also subject to agency interference. Stewards cannot provide a direct communications link to employees; the

2. On the other hand, disclosure of employees' names and home addresses to their bargaining representative has a *de minimis* effect upon their personal privacy when measured by "the characteristics revealed by virtue of being on the . . . list, and the consequences likely to ensue." *Department of State v. Ray*, 112 S.Ct. 541, 548 n.12 (1991).

Names and home addresses are publicly available from a number of sources, including motor vehicle and licensing records, voting lists, real property records, and telephone books. The only additional piece of "private" information that can be gleaned from a list of names and home addresses provided to the union is the fact of federal employment; employees can hardly be said to have a significant interest in keeping the fact of their employment hidden from their bargaining representative.

Further, the only consequence that will ensue from the disclosure of the information to the union is receipt of correspondence. There is every reason to believe, contrary to the government's suggestions (Pet. Br. at 21-22), that this correspondence will not be an unwelcome "disturbance" to most employees. Unlike the purveyors of "junk mail" the union does not represent an outside commercial interest; it represents the employees' *own* interests. And even where an employee is not interested in receiving correspondence from the union, "mail does not substantially impinge on seclusion, the addressee may send it to the circular file." *Department of the Air Force, Scott Air Force Base v. FLRA*, 838 F.2d 229, 232 (7th Cir.), *cert. dismissed*, 488 U.S. 880 (1988); *accord: FLRA v. Navy, Naval Ship Parts Control Center*, 966 F.2d 747, 759 (3d Cir. 1992) (*en banc*).

The government's suggestion that unions will use the lists of names and home addresses for purposes other

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average steward/employee ratio in NTEU units is 1/56, and employees are not permitted to spend work time discussing union matters in any event.

than communicating with employees about collective bargaining matters (Pet. Br. at 22) is meritless. As the Ninth Circuit observed, "there is no evidence that the unions plan to sell the lists, advertise, or otherwise seek commercial advantage through its mailings." *FLRA v. Department of the Navy, Naval Resale and Services Support Office*, 958 F.2d 1490, 1495 (1992); *see also FLRA v. Navy, Naval Ship Parts Control Center*, 966 F.2d at 759. Indeed if the government really considered this a serious risk, an agency could easily neutralize it by seeking a promise of confidentiality before releasing the addresses or by explicitly including such a promise in the collective bargaining agreement. *See* 966 F.2d at 760; *cf. NLRB v. New England Newspapers, Inc.*, 856 F.2d 409, 414 (1st Cir. 1988).[14]

There is similarly no merit to the government's suggestion that employees who are not union members are especially likely to suffer an invasion of privacy when they receive mail from their elected representative at home (Pet. Br. 21). The fact that an employee does not join the union does not necessarily or even logically imply that the employee has no interest in its activities on his or her behalf, any more than a resident of a Con-

[14] Further a union that misused the lists would likely forfeit its right to obtain them in the future and could be subject to criminal penalties (*see* 5 U.S.C. 552(a)(i)(3)).

The government's contention (Pet. Br. 22) that significant privacy interests are at stake because disclosure of employee names and home addresses cannot be limited to the union, but must be allowed for any requester is based upon a misapplication of the *Reporters Committee* case. As we show *infra*, the union's right to obtain information under the labor statute is broader than the right of a member of the public—like a commercial entity—who seeks disclosure solely pursuant to FOIA; accordingly, a ruling that unions may obtain names and addresses pursuant to the labor statute portends no greater release of that information than that statute authorizes. *FLRA v. Navy, Naval Ship Parts Control Center*, 966 F.2d at 759.

gressional district would necessarily resent informative materials from a legislator to whose campaign he did not provide support or whose candidacy he opposed. Our experience shows, in fact, that those federal employees who do not become union members most often are simply ignorant of the union's existence or services, are apathetic, or are disinclined to pay dues.

At the same time, if a federal employee has a "specific reason for keeping their home address out of union hands" (Pet. Br. at 21) the statute provides them protection. The FLRA has been delegated the statutory responsibility for considering "legitimate claims that disclosure will impose undue burdens" either on employees or on agencies, just as the NLRB shoulders that responsibility in the private sector. *Treasury*, 884 F.2d at 1450; *see Farmers Home Administration*, 23 F.L.R.A. at 798; *cf. Detroit Edison v. NLRB*, 440 U.S. 301, 317-321 (1979) (ruling that in light of privacy concerns private sector union not entitled to obtain employees' test scores despite their relevance). Should the employing agencies disagree with the FLRA's balancing of interests in a particular case (*see* Pet. Br. at 21-22, 25-26), they have resort to the courts of appeals. *See* 5 U.S.C. 7123(a).

C. Considering the Public Interest in Collective Bargaining Is Consistent with the Terms of the Privacy Act and the FOIA

Although the government would assign greater weight to the privacy interests implicated by the disclosure of names and addresses to the union, it does not deny that those interests are outweighed by the public interest in disclosure embodied in the labor statute. Instead, it argues that the terms of the Privacy Act and the FOIA, as interpreted by this Court in *Reporters Committee*, preclude the consideration of those public interests at all.

1. Thus, the government observes that the Privacy Act contains no exemption for information that promotes col-

lective bargaining (Pet. Br. 15; 17), that Privacy Act exemption 2 "directs attention to FOIA and only to FOIA" and that "nothing in FOIA provides for the release of information that promotes collective bargaining." *Id.* at 15. It further recites the principle that the Court cannot " 'create an exception where Congress has declined to do so'." Pet. Br. at 17, quoting *Freytag v. Commissioner of Internal Revenue*, 111 S.Ct. 2631, 2636 (1991).

The government's observations, however, are not pertinent. There is no need to create new exceptions to the Privacy Act to authorize the release of information to the union that it requires to discharge its statutory responsibilities. The Privacy Act already has an exemption for disclosures required by FOIA and FOIA's express terms mandate the release of *any* information—including information that promotes collective bargaining—unless one of its exemptions applies.

The FOIA exemption upon which the government relies only permits an agency to refuse to disclose information contained in "personnel and medical files and similar files" where it "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). The courts have held that determining whether a privacy invasion is "warranted" requires balancing privacy interests against countervailing interests in disclosure. FOIA itself does not specify the factors for evaluating the competing interests in privacy and in disclosure; those factors have been supplied by the judiciary when necessary to apply the "clearly unwarranted invasion of personal privacy" standard to the cases before them.

The government, therefore, can identify nothing in the language of any of the statutory provisions that precluded the FLRA from considering the public interests served by the labor statute when it applied that standard here. Its

effort to ground its position in the statutory text is, accordingly, unavailing.

D. Considering the Public Interests Served By Collective Bargaining Is Not Inconsistent With *Reporters Committee* and Is Necessary to Effectuate Congressional Intent Under the Labor Statute

Because there is nothing in the Privacy Act or in FOIA itself that precluded the FLRA from considering the public interest in collective bargaining in assessing whether any invasion of privacy was warranted, the government is left to argue that this Court's decision in *Reporters Committee* requires that result. *Reporters Committee*, however, applied the "unwarranted invasion of personal privacy" standard in an entirely different context.

Thus, *Reporters Committee* concerned a request by representatives of the news media, predicated upon the Freedom of Information Act, for disclosure of "rap sheet" information. The Court held that rap sheets on file with the Federal Bureau of Investigation are exempt from disclosure by virtue of FOIA exemption 7(c), which excludes from disclosure records or information compiled for law enforcement purposes, "but only to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).

The Court reached its conclusion by balancing the strong privacy interests that were at stake against the public interest in disclosure. The Court measured the public interest solely in terms of the policies Congress sought to promote in FOIA. 489 U.S. at 771-772. It held that whether or not disclosure of the rap sheet information was "warranted" depended upon its relationship to "the basic purpose of the Freedom of Information Act, 'to open agency action to the light of public scrutiny'." *Id.* at 772, quoting *Rose*, 425 U.S. at 372. Because FOIA was intended to give every member of the

public an equal right to disclosure, the Court ruled that the identity of the requester and the purpose for which he sought the information should not be a factor in assessing whether a privacy invasion is "warranted". *Id.* at 771.

The analysis the Court applied in *Reporters Committee* cannot be divorced from the context in which that case arose. In *Reporters Committee*, the only statutory basis for the disclosure request at issue was FOIA; for that reason, the only point of reference to assess whether the invasion of privacy was "unwarranted" was the public interest served by FOIA itself. *Reporters Committee*, in fact, did not purport to base its exposition of the balancing test upon any particular statutory language, but rather upon Congressional intent. The Court used the purpose of FOIA as the sole measure of the public interest in disclosure in an effort to be faithful to the Congressional intent underlying the disclosure provision the requesters had invoked.

Here, refusing to consider the public interests served by the labor statute cannot possibly protect the interests that Congress intended to promote. On the contrary, mechanical application of the factors in *Reporters Committee* to cases that arise under the labor statute undermines the important policies that statute serves. *See FLRA v. Department of Treasury*, 884 F.2d at 1457 (R. Ginsburg, J., concurring) (observing that it is "unlikely" that Congress intended to deny federal sector unions lists of names and home addresses of a kind routinely provided in the private sector); *id.* at 1458 ("nearly certain that Congress did not anticipate the outcome [that application of] *Reporters Committee* requires us to reach in this case").

By ignoring Congress' intent to afford unions a special right of access to information in recognition of their responsibilities in the federal labor-management relations program, the government would place the union in the

same position it would have occupied had the labor statute never been enacted—equivalent to any member of the public who seeks information from the government under FOIA. That anomalous reading of the statutes at issue has enormous practical consequences that directly collide with Congress' express recognition that labor organizations and collective bargaining in the federal civil service promote the public interest.

To discharge their function as collective bargaining representative, unions often need information that is significantly more personal than an employee's home address. Such information can include, among other things, payroll records, disciplinary files, performance evaluations and job applicant information.[15] Only by happenstance will a union's request for such information relate to the basic purpose of FOIA—to ensure that the government's activities are opened to public scrutiny—because the union will always be seeking the data for an entirely different purpose that stems from its relationship to the government as *employer*.

In many and perhaps most cases, contrary to the government's argument (Pet. Br. 26-27), the data the union requests will be completely useless if identifying details are deleted. In a typical discriminatory promotion case, for example, the union will need to review the personnel folder of the individual who was selected for promotion to assess whether discrimination occurred and whether to file a grievance. In assessing the strength of a union officer's complaint of retaliation, the union will need to know what actions the agency has taken against other similarly situated employees. When an agency is suspected of violating the Fair Labor Standards Act, the

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[15] *See FLRA v. Department of Treasury*, 884 F.2d at 1460 (R. Ginsburg, J., concurring), citing *AFGE v. FLRA*, 793 F.2d 1360 (D.C. Cir. 1986) (disciplinary records); *Internal Revenue Service and NTEU*, 25 F.L.R.A. 181 (1987) (performance appraisals).

union will need payroll records to directly contact employees who have worked overtime, to determine whether to file a grievance on their behalf.

In passing the labor statute, "Congress unquestionably intended to strengthen the position of federal unions and to make collective bargaining a more effective instrument of the public interest." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 107 (1983). Yet, under the government's argument, the employer will have a monopoly on access to crucial information, for a union's information requests must be denied if even the most insignificant privacy interest is at stake, no matter how compelling its need for the information to act as bargaining representative.

In fact, if the government is correct, then Congress has *prohibited* the federal employer from providing unions with necessary data that the federal government, in its sovereign capacity, *requires* the private employer to supply. That result makes the government's position all the more anomalous, given Congress' intent to "arm federal unions with capacity closer to that of unions in the private sector." *FLRA v. Treasury*, 884 F.2d at 1461 (R. Ginsburg, J., concurring).

The disparity created cannot logically be justified (as the government seems to suggest—Pet. Br. at 28) by some greater legislative solicitude for the privacy of federal employees. The government identifies nothing in the Privacy Act or its legislative history to show any consideration of federal employee privacy, much less their privacy in relation to the collective bargaining process. On the contrary, the Privacy Act was enacted primarily in response to concerns about the improper public release of information that the government gathers from its citizens in its role as sovereign.

Further, and equally important, considering the public interests served by collective bargaining is not the least

bit inconsistent with the protection of employee privacy. *FLRA v. Navy, Naval Ship Parts Control Center*, 966 F.2d at 761. It merely allows a reasonable balance to be struck between privacy interests and the countervailing interests the labor statute serves. *Cf. Detroit Edison v. NLRB*, 440 U.S. at 317-321 (balancing employee privacy and union need for information for collective bargaining).

The government's analysis, by contrast, does not balance competing interests; as noted, it establishes a *per se* rule against disclosure when any privacy interest is implicated. To give full effect to all relevant Congressional policies, the Court should clarify that when a request is predicated upon another Congressional enactment—such as the labor statute—determining whether a privacy invasion is "warranted" requires consideration of the public interests that statute promotes.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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